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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1116

WILLIAM E. BUFALINO,
Petitioner,
v.
THE MICHIGAN BELL TELEPHONE COMPANY, FRANK KAMINSKI, ROBERT KOSS, HOLLIS BALLEW, ROBERT BULLOCK, ALBERT C. CARR, DINO CONSTANTINI, WILLIAM DePUGH, VICTOR DeWOLF (alias Victor Dukes), MARVIN GILLESPIE, HOWARD GLADUE, ALBERT C. LANGTRY, EARL MILLER, FRANK MONTANA, ALBERT NORMALI, WILLIAM NOSEWORTHY, GEORGE O'CONNOR, JACK D. PENLAND, VINCENT PIERSANTE, ARNOLD J. PINN, PAUL QUAGLIA, BILLIE STARKS and Does, One to Thirty-One Inclusive,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner William E. Bufalino prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on 13 December 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not reported and is printed in Appendix A hereto, *infra,* p. 35.

Memorandum opinion of the United States District Court and order granting defendants' Motions for Summary Judgment and to Dismiss filed and entered on 27 April 1967, is printed in Appendix B hereto, *infra,* p. 46 and in *R p. 58 and in R. 82a.

Order of the United States District Court docketing plaintiff's second proposed amended complaint, filed and entered on 18 January 1967, is printed in Appendix C hereto, *infra,* pp. 58-59 and in R. 82a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on 13 December 1968 (Appendix A hereto, *infra,* p 35).

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

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* References prefixed "R." are to petitioner's printed appendix filed in the Sixth Circuit Court of Appeals and in this Court.

QUESTIONS PRESENTED

1. Whether both an interception and a divulgence are necessary for a violation of the Communications Act of 1934, Title 47, U.S.C.A., Section 605.

2. Whether the interception of a telephone conversation by means of the interjection of an independent mechanical device between the lips of the sender and the ear of the receiver, without the consent of either of the parties to the conversation, raises, a constitutional question insofar as the right of privacy is concerned, or is a litigable federal question under §605 of Title 47 U.S.C., upon which relief can be granted in a Federal District Court.

3. Whether §605 of Title 47, U.S.C.A., The Communications Act of 1934, is an "Act of Congress providing for equal rights of citizens," as the phrase is used in §1343(3) of Title 28, U.S.C., so as to give a Federal District Court jurisdiction in this cause.

4. Whether the amended complaint states a cause of action under The Civil Rights Act, Section 1983 of Title 42, U.S.C., so as to give Federal District Court jurisdiction in this cause.

5. Whether, on motions for summary judgment, the District Court or the Court of Appeals can decide a genuine issue of a material fact, when one exists.

6. Whether a person, or persons, specifically named in a civil conspiracy who fraudulently concealed the cause of action, can be removed by the District Court from the cause of action properly pleaded.

7. Whether a federal District Court should abstain from resolving federally created issues which are properly pleaded, when a state court may not be able to resolve them, thereby denying complainant relief and leaving him with a right without a remedy.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

47 U.S.C., §605, The Communications Act of 1934, reads in pertinent part as follows:

> . . .; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

28 U.S.C., §1337, provides in pertinent part as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . .

28 U.S.C., §1343, provides in pertinent part as follows:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the judisdiction of the United States.

42 U.S.C., §1983, provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. §1979.

Rule 26 of the Federal Rules of Civil Procedure, as amended 28 February 1966, effective 1 July 1966, provides in pertinent part as follows:

DEPOSITIONS PENDING ACTION

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action . . .

Rule 38 of the Federal Rules of Civil Procedure, as amended 29 December 1948, effective 20 October 1949, provides in pertinent part as follows:

JURY TRIAL OF RIGHT

(a) Right Reserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 56 of the Federal Rules of Civil Procedure, as amended 21 January 1963, effective 1 July 1963, provides in pertinent part as follows:

> (e) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
>
> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT

An appeal was taken by petitioner from an order of the United States District Court for the Eastern District of Michigan, Southern Division, granting respondents' motions for summary judgment and to dismiss petitioner's amended complaint.

This is a civil action for damages and other appropriate relief, filed on 12 July 1965, originally against the Michigan Bell Telephone Company, and Frank Kaminski and Robert Koss, two employees of said company, and fifty unnamed John Does. The amount in controversy exceeds the sum of

Ten Thousand Dollars ($10,000), exclusive of costs and interest.

The original complaint charged all respondents with unlawfully tapping the private telephones of petitioner William E. Bufalino in violation of 47 U.S.C., Section 605 and in violation of petitioner's constitutionally protected right to privacy; and, further, in violation of respondent Michigan Bell Telephone Company's contractual and legal duty to provide petitioner with uninterrupted, regular telephone service (R. 3a, 59a).

The original complaint also set forth allegations that at various times, unknown to petitioner, but known to respondents, they engaged in similar unlawful activities. In addition, paragraph 7 of Count II set forth an allegation that all respondents conspired together and accomplished their purpose to invade petitioner's privacy by means of unlawful interception and divulgence of his telephone calls (R. 11a).

In the first paragraph of the original complaint, petitioner averred:

> 1. That the defendants sued herein as Does, One to Fifty Inclusive, are fifty separate defendants sued herein by fictitious names for the reason that their true names and capacities are to the plaintiff unknown; and when said true names and capacities are ascertained, plaintiff will pray leave of this Court to substitute said true names and capacities for said fictitious names (R. 2a).

During a hearing on 4 November 1966, it was disclosed in sworn testimony before the District Court that the petitioner's home telephone was tapped (R. 193a) and that it was done at a secret police listening post by the witness Paul Quaglia, a Detroit police officer, together with others. He testified that he used earphones, a tape recorder and

a pen register (R. 187a, 188a). He listened to conversations over petitioner's home telephone, recorded them mechanically, transcribed them and turned them over to his superior (R. 188a, 190a). He listened to conversations between Petitioner and a person he concluded was Petitioner's wife (R. 188a). The District Court limited the examination of this witness and restricted the petitioner to interrogation only on matters alleged in the original complaint (R. 189a). At that time, petitioner advised the District Court of his intention to amend his complaint (R. 189a, 192a).

The District Court, on 31 October 1966, had also promised petitioner that he could take further discovery (R. 180a, 181a). The District Court said, ". . . I will assure you that you will be given adequate time to complete the discovery. Any reasonable request for an extension of time will be granted" (R. 181a). The District Court also said: "I would suggest you serve the notices for sometime after November 15th. I will give you adequate time to complete your discovery then" (R. 181a). But the District Court restrained petitioner from taking any discovery after 31 October 1966 (R. 45a, 82a).

On 9 November 1966, petitioner filed a motion for leave to file an amended complaint (R. 41a-44a). On 23 November 1966, the Court found that the first *proposed* amended complaint failed to state a claim upon which relief could be granted (R. 51a, R. 55a). The District Court held that the amendment proposed on 9 November 1966 was deficient in that it did not sufficiently notify the respondents of the claim filed so that they might be in a position to frame an intelligent response. The Court stated that it was fatal in at least two respects:

> (a) It contained no statement as to when the conspiratorial acts were committed, and

> (b) It was deficient in that it failed to relate each of the respondents to the general charge of conspiracy (R. 53a).

The District Court, at that time, denied petitioner's motion for leave to amend his original complaint, but granted him twenty (20) days in which to file a second *proposed* amended complaint that would meet the pleading requirements set forth in the Court's Memorandum Opinion dated 23 November 1966 (R. 55a).

Pursuant to that opinion, respondent filed a second *proposed* amended complaint designed to meet the pleading requirements set forth therein. Respondents Michigan Bell Telephone Company, Koss and Kaminski filed a motion in opposition to the formal docketing of the second *proposed* amended complaint. Briefs were filed by all parties, and the matter came on for hearing.

On 17 January 1967, the District Court stated in part as follows:

> It is Hereby Ordered that plaintiff's second proposed amended complaint be formally docketed and that no further action or discovery be taken in this matter until each of the defendants is served and given an opportunity to file responsive pleadings. (R. 82a) (Appendix C hereto, *infra* p. 59)

On 20 January 1967, petitioner's amended complaint was formally docketed, as ordered, and summons issued for each of the respondents. It was *proposed,* until it was ordered filed.

The amended complaint filed in this case constitutes a civil action against the Michigan Bell Telephone Company, six of its employees, one private detective, fourteen police officers of the City of Detroit, and thirty-one unidentified Does. The action arises out of an alleged conspiracy between the respondents to tap the telephone lines

of petitioner's private home telephone in violation of 47 U.S.C., Section 605. The amended complaint also sets forth claims for breach of contract and for invasion of privacy. The relief sought is money damages and such other relief as is deemed appropriate by the District Court (R. 81a, 193a).

On the afternoon of 10 June 1965, petitioner's wife made a long distance telephone call by dialing from petitioner's home telephone, Tuxedo 1-6859, to a Pennsylvania number, area code 717, Butler 7-2024 (R. 149a, 151a). Shortly thereafter, petitioner's telephone rang and petitioner's wife answered the call. The caller refused to identify himself and stated that it was sufficient for him to say only that he was the telephone company (R. 150a). When petitioner's wife refused to furnish the caller with her name and telephone number as demanded, the caller became abusive (R. 150a, 151a). The caller (respondent Kaminski) had a partner (respondent Koss) who intercepted the conversation and who spoke on only one occasion during the call, as he put it, on purpose to let the woman know that he was on the line (Koss, pp. 23, 24) (R. 130a, 131a, 133a). Koss talked to Kaminski in an effort to make petitioner's wife realize that if they were detected, Koss would back him up. Kaminski threatened to disconnect the service (Printed Record, p. 23[a]) and to make trouble for her (R. 198a).

Immediately thereafter petitioner's line went dead. In testing the line, after petitioner first reported the trouble, it was found that the coils had been removed from the cable pair in the Tuxedo Central Office (R. 35a). The following morning at 8:15, the line was put back in service. However, at approximately 10:00 a.m. on 11 June 1965, while the petitioner was talking with his wife from his office, Woodward 1-2384, to his home, Tuxedo 1-6859, the

call was interrupted and disconnected (R. 151a, 152a). At that point, petitioner's Tuxedo 1-6859 number rang, and a caller again refused to give his name. Petitioner's wife, recognizing the voice as being that of the caller on the previous day, asked him not to bother her and suggested that he call her husband at Woodward 1-2384 (R. 148a, 149a). Respondent Koss also intercepted this conversation (Koss, p. 25) (R. 131a, 132a). Together, Kaminski and Koss continued on their plan and program to invade the privacy of the petitioner and his family. Respondent Kaminski made this clear when he said, "She's asking for trouble and she's going to get it" (R. 19a).

During the investigation by respondent Michigan Bell Telephone Company, an associate of Respondent Kaminski conceded that his (Kaminski's) testing procedures were improper (R. 36a), and he (Kaminski) handled it wrong (R. 27a). Petitioner's line had not been out of order prior to respondent Kaminski's call to petitioner's home on 10 June 1965 (R. 22a, 23a).

As far back as 9 November 1966, petitioner filed an affidavit calling the District Court's attention to a secret police listening post from which petitioner's line was tapped. Petitioner also detailed an expense record giving specific dates, amounts paid out, the purpose for such payments and the person involved which included all 14 respondent Detroit City Police Officers (R. 44a). But petitioner was restrained by Court Order from taking discovery (R. 82a), notwithstanding the fact that on 31 October 1966, the Court had promised him an opportunity to take discovery (R. 181a).

The amended complaint contained specific averments as to when the conspirational acts were committed, and it related each of the respondents to the charge of conspiracy specifically alleged and relating to specific incidents. No

responsive pleadings were ever filed by any of the respondents in answer to the petitioner's amended complaint. The District Court ruled it had no jurisdiction in the breach of contract and invasion of privacy counts (R. 202a). (Appendix B hereto, *infra,* p. 46) and that there was no litigable federal question in this case.

Petitioner's amended complaint was dismissed by the District Court as to all respondents except respondents Michigan Bell Telephone Company, Koss and Kaminski; and, as to them, summary judgments were granted.

The United States Court of Appeals for the Sixth Circuit affirmed the summary judgments of the District Court in favor of respondents Michigan Bell Telephone Company, Koss and Kaminski and affirmed the judgment of the District Court in favor of all of the other respondents except for four of the fourteen named police officers of the Police Department of the City of Detroit.

REASONS FOR GRANTING WRIT

I.

WHETHER BOTH AN INTERCEPTION AND A DIVULGENCE ARE NECESSARY FOR A VIOLATION OF THE COMMUNICATIONS ACT OF 1934, TITLE 47, U.S.C.A., SECTION 605, WAS SPECIFICALLY RESERVED BY THIS COURT IN BENANTI v. UNITED STATES, 355 U.S. AT PAGE 100, NOTE 5. THERE, THE COURT SAID THAT SINCE BOTH INTERCEPTION AND DIVULGENCE WERE INVOLVED, THE COURT NEED NOT CONSIDER WHETHER TAPPING ALONE WAS UNLAWFUL. THIS QUESTION HAS NEVER BEEN—BUT SHOULD BE SETTLED BY THIS COURT.

In *Rathbun v. United States,* 355 U.S. 107, this Court stated in footnote 3 at page 108:

> We do not decide the question of whether Section 605 is violated where a message is intercepted but not divulged since the police officers did divulge the contents of the overheard conversation when they testified in Court. Cf. *Benanti v. United States*, 355 U.S. 96; 78 S. Ct. 155.

The decision in the instant case is in direct conflict and derogation of the law as set forth in *Benanti v. United States,* 355 U.S. 96 and *Rathbun v. United States,* 355 U.S. 107 as well as *Griswold v. Connecticut,* 381 U.S. 479. The District Court held, and it was affirmed by the Sixth Circuit Court of Appeals, that both unlawful interception and divulgence are necessary, in a civil suit for damages, for a violation of Section 605 (R. 200a) (Appendix B hereto, *infra*, p. 46).

As the matter now stands, conflicting interpretations of Section 605 by the District Courts of the United States and the various United States Courts of Appeals neces-

sarily place in jurisdictional limbo all cases where there is an interception of a telephone communication, as defined in *Benanti* and *Rathbun*. This not only affects the question of federal jurisdiction, but also the questions of invasion of privacy or breach of contract since the unlawful interception of the communication is the vehicle by which the invasion of privacy and breach of contract are effected. The District Court held that in the instant case there was no cause of action under Section 605 of Title 47 U.S.C., the Communications Act, and because of this finding there was no litigable federal question to which the District Court could consider the invasion of privacy and breach of contract issues (R. 202a) (Appendix B hereto, *infra*, p. 54).

II.

THE INTERCEPTION OF A TELEPHONE CONVERSATION BY MEANS OF THE INTERJECTION OF AN INDEPENDENT MECHANICAL DEVICE BETWEEN THE LIPS OF THE SENDER AND THE EAR OF THE RECEIVER, WITHOUT THE CONSENT OF EITHER OF THE PARTIES TO THE CONVERSATION, RAISES A CONSTITUTIONAL QUESTION INSOFAR AS THE RIGHT OF PRIVACY IS CONCERNED UPON WHICH RELIEF SHOULD BE GRANTED IN A FEDERAL DISTRICT COURT. IT ALSO RAISES A LITIGABLE FEDERAL QUESTION UNDER SECTION 605, TITLE 47 U.S.C. UPON WHICH RELIEF COULD BE GRANTED.

Petitioner contended in the District Court that the interjection of respondent Koss into the connection between petitioner's wife and respondent Kaminski, without the consent of either, by an independent mechanical device at a point between the sender and the receiver was an unlawful interception of the message while it was on its way (R. 199a) (Appendix B hereto, *infra*, p. 53).

In the instant case, the District Court found:

> . . . that the interception in this case was not unlawful *per se.* It would be unlawful if accomplished without the consent of one of the parties to the conversation; and, as noted above, that issue is disputed. (R. 200a) (Appendix B hereto, *infra,* p. 53)

The Court also said:

> However, there is a dispute of fact as to whether Koss had obtained the prior knowledge and consent of Kaminski to overhear the above-described conversations. (R. 199a) (Appendix B hereto, *infra,* p. 52)

Petitioner cited *Benanti v. United States (supra),* and *Rathbun v. United States (supra).* But the District Court ruled that there is no logical basis for distinguishing between the consented use of an extension telephone and the unlawful intrusion by mechanical means into the communication system by a telephone company employee (R. 199a, 200a) (Appendix B hereto, *infra,* p. 53).

In the instant case, the telephone messages were intercepted by the interjection of an independent receiving device between the lips of the sender and the ear of the receiver. All of this was done without the consent of either the sender or the receiver. The United States Court of Appeals for the Sixth Circuit affirmed the ruling of the District Court that:

1. although the question of consent to intercept is a disputed question of fact (R. 199a) (Appendix B hereto, *infra,* p. 53); and
2. although it is unlawful to intercept without the consent of one of the parties to the conversation R. 200a) (Appendix B hereto, *infra,* p. 53);

3. even if the interception were found to be unlawful, the respondents could not be liable for violation of Section 605 because the District Court could see no divulgence (R. 200a) (Appendix B hereto, *infra*, p. 54).

The implications of the decision in the Court below are far-reaching. If, as the Court below, in effect, concluded, there is no distinction between the consented use of an extension telephone and the unlawful intrusion by mechanical means into the communication system by a telephone company employee, no subscriber would have a cause of action even if:

1. The interception was unlawful (R. 200a) (Appendix B hereto, *infra*, p. 54).
2. The telephone company employee threatened to make trouble for the subscriber (R. 19a, 198a) (Appendix B hereto, *infra*, p. 51).
3. The telephone company employee uses poor judgment (R. 36a).
4. The employee handles the call improperly (R. 27a).
5. The employee is unreliable (R. 27a).
6. There is absolutely no need to call the subscriber (R. 27a).

The District Court seemed to find solace in the fact that the unlawful intruder, or wire tapper, was a telephone company employee. Section 605 excepts no one. It states in pertinent part as follows:

> . . . *no person,* not being authorized by the sender, shall intercept *any* communication . . . (emphasis added)

In the instant case, the District Court ruled, and it was affirmed by the Sixth Circuit Court of Appeals, that there was no cause of action based upon Section 605 of Title 47, U.S.C., and, therefore, no pendent jurisdiction attached as to the breach of contract and invasion of privacy matters (R. 202a) (Appendix B hereto, *infra,* p. 54). Summary judgments were then granted to respondents Michigan Bell Telephone Co., Koss and Kaminski. As a result the District Court denied petitioner the right to trial on the breach of contract and invasion of privacy issues (R. 202a) (Appendix B hereto, *infra,* p. 54). The District Court held there was no litigable federal question.

If this decision is permitted to stand, it will revolutionize the current practice insofar as summary judgments and motions to dismiss are concerned without regard to the Federal Rules of Civil Procedure relating to Discovery, Summary Judgments and Motions to Dismiss. It will also have the effect of emasculating *Rathbun* and *Benanti* as well as ignoring *Griswold.*

III.

PETITIONER CONTENDS THAT SECTION 605 OF TITLE 42, U.S.C., THE COMMUNICATIONS ACT OF 1934 IS AN "ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS OF CITIZENS," AS THE PHRASE IS USED IN SECTION 1343(3) OF TITLE 28, U.S.C., SO TO GIVE THE DISTRICT COURT JURISDICTION IN THIS CAUSE. THIS IS A QUESTION OF GREAT IMPORTANCE WHICH, WHEN RESOLVED BY THIS COURT, WILL CLEAR THE CONFUSION WHICH PRESENTLY EXISTS IN FEDERAL DISTRICT COURTS.

The first questions are whether The Communications Act of 1934 imposes a civil, as well as a criminal liability upon anyone who intercepts a telephone communication without the consent of either the sender or the receiver, and if so, whether the District Court has jurisdiction over the action.

Although the Act does not expressly create any civil liability, there is no reason why the situation is not within the doctrine which construes a criminal statute enacted for the protection of a specific class, as creating a civil right in members of the class, although the only express sanctions are criminal.

In *Newfield v. Ryan,* 91 F. 2d 700, 703, the Fifth Circuit has already implied as much as to Section 605 and so has the Second Circuit in *United States v. Goldstein,* 120 F. 2d 485, 490.

Reitmeister v. Reitmeister, 162 F.2d 691 (2nd Circuit) holds that Section 605 creates a civil action for damages in favor of one whose line is tapped. Petitioner claims that the civil right is coextensive with the criminal liability.

In the instant case, it is admitted that respondents Koss and Quaglia intercepted telephone conversations over the telephone line of the petitioner; and, this they did on various occasions by taking or seizing the messages as they were on the way and before they arrived at their destination.

The District Court observed in its opinion that the petitioner claimed that Section 605 was intended to secure the inviolability of the entire communication itself. The District Court said:

> The Court does not agree with this position. . . . (R. 199a) (Appendix B hereto, *infra,* p. 53).

For authority, petitioner relies on *Goldman v. United States,* 316 U.S. 129. At page 133, the Court states in pertinent part as follows:

> The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation.

In *Wolf v. People of the State of Colorado*, 338 U.S. 25, this Court said at pages 27 and 28:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such, enforceable against the States through the Due Process Clause . . .
>
> Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment.
>
> See also *Stefanelli v. Menard*, 342 U.S. 118, 119, 120.

In Stefanelli, the Court reserved the question as to whether jurisdiction lay under Section 1343(3) since there was no occasion to consider such constitutional questions. But it seems that the answer to this question is indispensable to the disposition of the instant case by this Court.

IV.

PETITIONER CONTENDS THAT THE AMENDED COMPLAINT STATES A CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACT, SECTION 1983 OF TITLE 42 U.S.C., THEREBY RAISING A FEDERAL LITIGABLE QUESTION.

This suit was brought, among other sections, under Section 1983 of Title 42 U.S.C., providing for redress against:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or to be subjected, any citizen of The United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws . . .

Since this case raises important questions touching the Civil Rights Act in the context of our federal system, this Court should here decide whether petitioner's amended complaint states a cause of action under Section 1983 of Title 42, U.S.C., since the relief here sought may fairly and constitutionally be derived from the language of the Civil Rights Act. Here, the balance of the discretion exercised by the District Court in refusing to assert jurisdiction weighs heavily upon the petitioner since the District Court, as a result of such refusal, has granted summary judgments in favor of some defendants and has dismissed the complaint as against others.

Weighing the individual rights to privacy against the need for effective police work, we are met with the kind of values which characterizes many areas of our law and our social organization. In the case of wire tapping, however, this competition of social interests has resulted in a dangerous stalemate—a failure to find a workable adjustment—which leaves the average citizen at the mercy of the more ruthless in our population. For, despite the statutes and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation of the federal, state, municipal and private levels.

The instant case is a classic example of this type of lawlessness. In sum, it is beyond dispute that there is a general, indeed universal, custom of federal law violation by private detectives and by city and state police officers.

V.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THE INSTANT CASE (APPENDIX A HERETO, INFRA, pp. 35-45), IN AFFIRMING THE SUMMARY JUDGMENTS GRANTED BY THE DISTRICT COURT, IS DIRECTLY IN CONFLICT WITH ITS OWN DECISION IN BOHN ALUMINUM AND BRASS CORPORATION v. STORM KING CORPORATION, REPORTED IN 303 F.2d 425 (APPENDIX D HERETO, INFRA, pp. 60-64).

Judge Weick, in that case, stated that:

> The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute . . . (Appendix D hereto, *infra,* p. 63)

The decision in the instant case is in conflict with the decision of the Court of Appeals for the Third Circuit in the case of *Bowman Steel Corporation v. Lumbermens Mutual Casualty Company,* 364 F. 2d 246, 250 (1966). In *Bowman,* it was held that on motion for summary judgment neither the District Court nor the United States Court of Appeals can decide genuine issues of fact. See also *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F. 2d 114, 3rd Circuit (1965).

The questions at issue here involved are a matter of utmost importance to the interpretation and application of Rule 56 of the Federal Rules of Civil Procedure. It is of great importance in the administration of justice that there be uniform interpretation and application of Rule 56 of the Federal Rules of Civil Procedure among the United States Courts of Appeal.

The District Court ruled that a fact on a material issue is in dispute in this case (R. 199a, 200a) (Appendix B hereto, *infra*, pp. 52-53). A sharp controversy of fact exists as to the question of whether or not respondent Koss had permission from respondent Kaminski to intercept the telephone conversation between petitioner's wife and respondent Kaminski.

In the instant case, the District Court drew fact inferences on the motion for summary judgment; and the District Court ruled that there was no divulgence of the intercepted messages by respondent Koss, which is also a fact question. A judge may not, on a motion for summary judgment, draw fact inferences. Such inferences may be drawn only on a trial. *Bragen v. Hudson County News Co.*, 278 F. 2d 615; *Cross v. United States*, 336 F. 2d 431.

Federal Rules of Civil Procedure are being liberalized and applied constantly with the purpose of giving the plaintiff an opportunity to have his case determined by the facts as they really are, and not be precluded because of some technical or strict application of a rule of procedure. All this is done to secure the just, speedy and inexpensive determination of every action. This Court has often applied the Rules of Civil Procedure to avoid resolving cases on technicalities. See, eg., *Conley v. Gibson*, 355 U.S. 41. This policy requires that amendments to pleadings be freely allowed, *Foman v. Davis*, 371 U.S. 178 (1962); *United States v. Stephen Brothers Line*, 384 F. 2d 118, 124, 125 (Fifth Circuit, 1967).

The motion for summary judgment must be denied unless it appears certain that the plaintiff is entitled to no relief under any state of facts that could be adduced in support of its claim. *Conley v. Gibson*, 355 U.S. 41; *Brown v. Bullock*, 194 F. Supp. 207. Affirmed 294 F. 2d 415. In the *Bullock* case, it stated at page 247 of 194 F. Supp. that:

> It is reversible error to dismiss a complaint where "under any reasonable reading, the complaint states a claim upon which relief can be granted," although the complaint may contain "ambiguities."

The decision in the instant case does injustice to the petitioner herein, and will have the effect of preventing claimants with just claims from having a forum in which to seek redress for alleged wrongs simply because their complaint is not a model of simplicity; but where, under any reasonable reading, the complaint states a claim upon which relief can be granted. The instant case stands for the proposition that a complainant is not permitted discovery after the revelation of fraudulently concealed wire tapping activities of the respondents named in the amended complaint filed after being considered by the District Court pursuant to the order of the District Court; and that the complaint thereafter can be summarily dismissed without permitting discovery and without requiring a responsive answer from any of the respondents.

The decision in the instant case denied petitioner the right to have a trial by jury in a civil case where genuine issues of a material fact are in dispute as provided for by Rule 38 of the Federal Rules of Civil Procedure and as guaranteed by the Seventh Amendment to the Constitution of the United States. *Peckham v. Ronrico Corp., et al.*, 171 F. 2d 653.

VI.

PETITIONER CLAIMS THAT THE SIXTH CIRCUIT COURT OF APPEALS WAS INCONSISTENT IN RULING THAT PETITIONER'S AMENDED COMPLAINT STATED A CAUSE OF ACTION AGAINST FOUR DETROIT POLICE OFFICERS—ORDERED AN EVIDENTIARY HEARING—AND AT THE SAME TIME AFFIRMED THE DISMISSAL OF THE COMPLAINT AGAINST TEN OTHER CITY OF DETROIT POLICE OFFICERS WHO WERE SPECIFICALLY NAMED IN THE CIVIL CONSPIRACY ALLEGED AND WHO FRAUDULENTLY CONCEALED THE CAUSE OF ACTION FROM PETITIONER.

In the instant case, the United States Court of Appeals for the Sixth Circuit, in reversing the District Court's dismissal as to respondents Quaglia, O'Connor, Noseworthy and DePugh, decided that the amended complaint stated a claim upon which relief can be granted (Appendix A hereto, *infra,* p. 43). But it affirmed the dismissal of the complaint as to the remaining ten police officers (Appendix A hereto, *infra,* p. 45) and ordered an evidentiary hearing on only four of the fourteen City of Detroit police officers named as respondents (Appendix A hereto, *infra,* p. 45).

A classic example of the error committed by such a dismissal is the case of respondent Victor DeWolf who used the alias of Victor Dukes; and under such assumed name subscribed to various telephone lines for the purpose of tapping the petitioner's telephone line (R. 62a, paragraphs 21 and 22 of amended complaint).

When an actionable wrong has been committed, and a cause of action is fraudulently concealed, recovery under our federal procedure must be granted, and relief cannot be denied because the complainant does not plead, with specific particularity, facts which are peculiarly within the

knowledge of the named respondents, especially when the complainant is restrained by order of the District Court from taking discovery.

The respondent Michigan Bell Telephone Company is clearly tied into this conspiracy, for example, by paragraph 20 of the amended complaint (R. 61a, 62a), where it is alleged that it ran telephone lines to, and installed telephone equipment at the secret police listening post in 1962 and 1963 from which petitioner's home telephone line was tapped as related by respondent Quaglia in his affidavit (R. 93a-95a) and under oath on 4 November 1966 during a Federal District Court hearing on a related matter (R. 187a, 188a, 190a). There, he admitted that there was a wire tap on petitioner's telephone line and that the conversations were intercepted, transcribed and divulged. He also testified to the fact that there was a pen register on petitioner's line.

Paragraphs 19 through 28 of the amended complaint (R. 62a, 64a) are only a few allegations in the complaint which relate respondent Michigan Bell Telephone Company, its employees and others to the conspiracy alleged with specific dates, times and places connecting each of the named respondents with the charges alleged so as to apprise them of the nature of the claims against them in order that they can adequately prepare their defense and file a responsive pleading. No responsive answers were required of any of the respondents to the petitioner's amended complaint.

It is interesting to note that two of the respondents named in the instant case, Michigan Bell Telephone Company and Albert Langtry, were sued in the Eastern District of Michigan, Southern Division, in another wire tapping case involving the use of a pen register and tapping of a telephone line. *Huff v. Michigan Bell Telephone Co., and Albert Langtry,* 278 Fed. Supp. 76. In that case defendant

Langtry placed a pen register on a telephone on the premises of the telephone company and later installed a wire tapping mechanism on the telephone to monitor and record telephone calls made by the employees using the telephone. There, District Court Judge Levin said at page 77:

> Violations of Section 605 may result in civil liability for damages. *Reitmeister v. Reitmeister,* 162 F. 2d 691 (2nd Cir. 1947). The statute applies to intra-state communications if the lines are connected to interstate lines, as they are here. *Weiss v. United States,* 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298 (1939); *Elkins v. United States,* 266 F.2d 588 (9th Cir. 1959). A pen register has been found to be an interception within the meaning of this clause, since it discloses the "existence" of a communication, *United States v. Caplan,* 255 F. Supp. 805 (E.D. Mich. 1966); *United States v. Dote,* 371 F.2d 176 (7th Cir. 1966), and of course a wiretapping mechanism placed on a line is an interception.

As in the instant case, the defendants in *Huff, supra,* claimed that the courts have found an exception to the application of Section 605 in cases involving telephone companies. But District Judge Levin observed at pages 78 and 79:

> These cases are inapplicable. . . . But even in this class of cases, the Court of Appeals for the 9th Circuit recently held that to sanction wiretapping on the part of the telephone company beyond that necessary for such purposes "would tend to emasculate the protection of privacy Section 605 was intended to protect." *Bubis v. United States,* 384 F.2d 643 (9th Cir. 1967).
>
> • • • • •
>
> The Telephone Company's ownership of the telephone line and of the premises where it was installed did not "entitle" the Company or its agent to

> intercept calls made over that line. One of the interests protected by the statute is the privacy of conversations between a "sender" and a "receiver", and nowhere in the statute is any special recognition given to any rights of the subscriber to intercept and divulge. The exception urged by the defendants for telephone subscribers, if adopted, would open the door to vastly increased use of the wiretap. No one using the telephone of another could be confident that the conversation was not being tapped, and the right of privacy intended to be protected by the statute would be severely impaired.

Respondent Langtry testified briefly in a hearing on 4 November 1966; but, at that time, he was not named defendant and the District Court permitted interrogation only on the motion for an order to produce records. Petitioner's affidavit, attached to that motion (R. 46a), shows what respondents Normali and Langtry really are. The affidavit reads in pertinent part as follows (R. 46a, 47a):

> Affiant requests this Court to take judicial notice of sworn testimony taken in Recorder's Court of the City of Detroit, case file numbers A116-316 and A116-337. Mr. Albert Normali (a substitute for a "Doe" in the instant case) gave the following answers to the following questions:
>
> Page 14:
>
> Q. I say, isn't it a fact that Albert Langtry is a liaison officer between the Detroit Police Department and Michigan Bell Telephone Company when wire taps are involved?
>
> A. I want to add one thing to that before I make a statement. Legal wire taps, is what we are talking about. Yes?
>
> Q. In other words, Albert Langtry is the liaison officer?
>
> A. Right.

The Albert Langtry referred to herein is the same Albert Langtry substituted for a "Doe" in the proposed amended complaint.

Plaintiff is informed, and verily believes, that Mr. Langtry, Mr. Normali, Mr. Piersante and others conspired with each other, and with others, to tap and did tap, plaintiff's telephone line as alleged in the complaint and proposed amended complaint in this case.

Mr. Normali gave the following answers to the following questions:

Pages 6 and 7:

Q. You were known as an electronic expert at the Detroit Police Department, were you not?

A. That's right.

Q. And a good deal of your work had to do with wire taps, did it not?

A. I had something to do with it, yes.

Q. You done some wire tapping, is that correct?

A. Right.

Plaintiff is informed, and verily believes, that this Mr. Albert Normali is the same person who caused the taps to be placed on plaintiff's telephone line; that he set up the listening post at 15415 East Mack Avenue, Detroit, Michigan; that he was working in collaboration with Mr. Albert Langtry of the Michigan Bell Telephone Company and others under the direction and supervision of Vincent Piersante (a substitute for a "Doe"). Mr. Normali testified that he was working for the Detroit Police Department through November of 1965, (T. Recorder's Court, March 29, 1966, page 3).

The amended complaint contains specific allegations regarding respondent Langtry in paragraphs 5 (R. 58a), 14 (R. 60a), 16 (R. 60a, 61a), 18 (R. 61a), 22 (R. 62a) and 50 (R. 69a). Wire taps and pen registers are not foreign to respondent Langtry. During the extra-judicial hearing in *Huff, supra* (278 Fed. Supp. at page 77), he admitted that he used a pen register on the public telephone located

in the lounge of the telephone company; that he tapped the line and *intercepted, recorded* and *divulged.* This was in 1962—the same time alleged in petitioner's amended complaint; and the system, as described by respondent Quaglia was identical—pen register, recorder and wire tap. In *Huff, supra,* District Judge Levin denied the motion to dismiss and ordered an early trial for defendants Michigan Bell Telephone and Langtry.

But the instant case, which was instituted on 12 July 1965, was dismissed as to respondent Langtry and other co-conspirators although the complaint and the affidavits in the record show he was a liaison officer between the Police Department and the Telephone Company for wire tap purposes.

The entire scheme or venture engaged in by all of the respondents, by its very nature, was a concealed activity carried on in a highly secretive and confidential manner in order to avoid detection and to conceal this cause of action from the petitioner.

Petitioner had sought, without success, to obtain the records of installation of all telephone instruments at 15415 East Mack Avenue, Detroit, Michigan, from 1962 to 1965. This was the secret police listening post. He was advised by counsel for the telephone company that there were no installations in 1962, 1963 and the early part of 1964. Yet, respondent Quaglia, who intercepted and recorded petitioner's telephone calls, testified on 4 November 1966 that he attended to the tapped telephone installations in 1962 and 1963 (R. 183a).

All of the respondents embarked on a knowing venture of interception and divulgence of the telephone conversations that went over petitioner's home telephone line. They all went on a knowing venture, at one time or another, to in-

vade petitioner's privacy. Some were principals and others were aiders and abettors, but all of the respondents sought by affirmative action of one kind or another to make these ventures succeed.

In *Huff, supra,* the defendants did not appeal, and unfortunately this aggravates the existing conflict in this District. The instant case, as affirmed by the Sixth Circuit Court of Appeals would appear to be the law of this Circuit, when in fact the decision in *Huff, supra,* is supported by many landmark decisions of this Court.

VII.

PRIVACY WHICH IS INVADED BY THE UNLAWFUL INTERCEPTION OF TELEPHONE COMMUNICATIONS IS A FEDERALLY CREATED RIGHT WHICH IS PROTECTED NOT ONLY BY SECTION 605 OF TITLE 47, U.S.C., BUT ALSO BY THE CONSTITUTION OF THE UNITED STATES. THE QUESTION OF WHETHER A FEDERAL DISTRICT COURT SHOULD ABSTAIN FROM RESOLVING CERTAIN ISSUES OR RETAIN JURISDICTION UNTIL A STATE COURT HAS TAKEN DEFINITE ACTION HAS LONG DISTURBED THE FEDERAL COURTS AND SHOULD BE SETTLED BY THIS COURT.

The summary judgment in the instant case, on behalf of respondents Michigan Bell Telephone Company, Koss and Kaminski, deprives petitioner of a federal trial forum for his invasion of privacy and breach of contract issues. Such abstention offends the settled policy against piecemeal litigation. All of the issues in a single case should be determined in a single system of courts. *Hurn v. Oursler,* 289 U.S. 238; *Siler v. Louisville & N.R.R.,* 213 U.S. 175. When a different course is followed, the parties are victimized by confusion and frustrating delay, as in the instant case. Petitioner is entitled to a remedy in Federal Court and to a full adjudication of all the issues—and not by halves.

In the instant case, the District Court made it clear that the issues it deemed to be state issues, i.e., invasion of privacy and breach of contract between respondent Michigan Bell Telephone Company and the petitioner, were being excised from the Federal Court litigation and that the petitioner could go to a state court if he so desired (R. 202a, 203a) (Appendix B hereto, *infra*, p. 54). But here, there is no likelihood that a state court could dispose of these issues since the technical defenses at this point, such as the Statute of Limitations being a bar might successfully be raised, thereby depriving petitioner of having these issues resolved, although they were contained in an action properly instituted in a Federal District Court within the statutory period, on 12 July 1965, over 43 months ago.

This was a self-limitation of jurisdiction by the District Court over the invasion of privacy and breach of contract issues in a case in which it undertook to grant summary judgments in favor of respondents Michigan Bell Telephone Company, Koss and Kaminski. The District Court could have definitely decided these questions. It seems anomalous for the District Court to determine some federal issues and then decline to determine issues of invasion of privacy and breach of contract. If such a dissection is to be permitted, a weary petitioner would be compelled to proceed to the state court where there would be a record clouded by nuances of prejudice. There is no place in our federal system for such delay and frustration of private litigants.

The District Court could have retained jurisdiction pending the outcome of state proceedings. As the case now stands, petitioner is spiked on the horns of a dilemma. The state court might very well decide that the invasion of privacy or breach of contract issues raise federal questions or

are controlled by federal statutes, and should be resolved in a Federal Court. But now, under those circumstances, petitioner will be left with a constitutional right, but without a remedy either in a state court or in a federal court through no fault of his own.

At that point, the petitioner could not return to the Federal District Court to relitigate his federal claims because of the applicability of the doctrine of *res judicata* since the District Court here granted summary judgments to respondents Michigan Bell Telephone Company, Koss and Kaminski.

In the instant case, the District Court has a constitutional duty to determine the issues of invasion of privacy and breach of contract between a telephone company and a subscriber. This Court has declared that the supremacy clause (United States Constitution, Article VI) requires the federal District Courts to entertain suits to enforce federally created rights of action. *Testa v. Katt,* 330 U.S. 386; *Second Employers' Liability Cases,* 223 U.S. 1; *cf. United States v. Bank of New York & Trust Co.,* 296 U.S. 463, 479.

The District Court observed that:

> . . . there must be an end to all litigation . . .
> (Appendix B hereto, *infra,* p. 57)

But this is not an inflexible rule. It should be varied to prevent the doctrine of abstention from expanding beyond its justifying rationale to the point of depriving a plaintiff of his constitutional and statutory right to a federal adjudicaion.

An outright dismissal by the District Court, such as that in the instant case, has been rejected. Judge Learned Hand, in discussing the purpose of the retention technique stated that it was to allow the plaintiff "to obtain a declara-

tory judgment limited to state issues; thereafter the district court can dispose of any federal issues that may remain." *East Coast Lumber Terminal, Inc. v. Town of Babylon,* 174 F. 2d 106, 112 (2nd Circuit).

The District Court should have determined the entire controversy, since the purpose of retaining a complaint is simply to protect the plaintiff against irreparable injury from unreasonable delay in state court relief. See *Hart & Wechsler, The Federal Courts and The Federal System,* 869 (1953).

The application of the doctrine of abstention by the District Court in a case which began on 12 July 1965, and has not gone beyond the complaint stage and with summary judgment granted, works an undue hardship upon the petitioner. At this point, with all of the foreseeable complications — extended and expensive litigation — a weary petitioner finds himself with a right without a remedy unless this Court grants this petition for a writ of certiorari.

CONCLUSION

The affirming of the summary judgments and the dismissal of the petitioner's complaint as affirmed by the United States Court of Appeals for the Sixth Circuit is a complete judicial abnegation of federal jurisdiction over matters affecting the rights of citizens protected by The Communications Act of 1934, Title 47 U.S.C., Section 605, by the Constitution and the laws of the United States.

Because the decision rendered below is in conflict with its own prior decision on the question of summary judgments; and since it creates a conflict between the United States Circuit Courts of Appeal; and since it decides federal questions in conflict with applicable decisions of this Court; and decides an important question of federal law which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 18005

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

William E. Bufalino,
Plaintiff-Appellant,
v.
The Michigan Bell Telephone Company, Frank Kaminski, Robert Koss, Hollis Ballew, Robert Bullock, Albert C. Carr, Dino Constantini, William DePugh, Victor DeWolf (alias Victor Dukes), Marvin Gillespie, Howard Gladue, Albert C. Langtry, Earl Miller, Frank Montana, Albert Normali, William Noseworthy, George O'Connor, Jack D. Penland, Vincent Piersante, Arnold J. Pinn, Paul Quaglia, Billie Starks and Does, One to Thirty-One Inclusive,
Defendants-Appellees.

Appeal from United States District Court for the Eastern District of Michigan Southern Division.

Decided December 13, 1968.

Before: Weick, Chief Judge, O'Sullivan and McCree, Circuit Judges.

Weick, Chief Judge. This appeal is from an order of the District Court granting defendants' motions for summary judgment and to dismiss the second amended complaint.

The original complaint named as defendants "The Michigan Bell Telephone Company, Frank Kaminski, Robert Koss, and Does, One to Fifty, Inclusive."[1]

The complaint contained two counts. The first count set forth a claim for damages in the amount of $1,550,000, alleging that defendants tapped the telephone line serving plaintiff's residence and intercepted and divulged the contents of telephone calls of plaintiff, his wife and children, and also alleged that plaintiff's private, confidential and privileged conversations and communications with his clients were invaded, thereby causing serious harm to him in his profession as a lawyer and to the offices which he held. The second count was for damages in the amount of $2,100,000, alleging a conspiracy to tap plaintiff's telephone lines and intercept and divulge the contents of telephone calls in violation of his contractual rights and his right to privacy.

Kaminski and Koss were servicemen, employed by Michiban Bell as testman and cable splicer, respectively. The fifty John Does were not identified and no process was served upon any of them.

The case had pended for about fifteen months, during which time there was extensive discovery, and the named defendants filed a motion for summary judgment. An evidentiary hearing was granted and additional testimony taken. The court took the motion under advisement.

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[1] The Michigan Bell Telephone Company will be referred to as Michigan Bell or company.

Plaintiff's motion for leave to file his first proposed amended complaint was heard and denied by the court in a memorandum opinion because of the vague and conclusory nature of the allegations therein. Thereafter leave was granted to plaintiff to file a second amended complaint which would meet the pleading requirements set forth in the opinion of the court. In said complaint plaintiff named as additional defendants four Michigan Bell employees, a private detective, and fourteen police officers of the City of Detroit. The number of John Does was reduced from fifty to thirty-one.

The motion for summary judgment was amended and renewed and motions to dismiss were filed in behalf of Michigan Bell, its employees, and the fourteen police officers of the City of Detroit. The District Judge considered said motions together with the testimony taken in open court, affidavits, depositions of fifteen witnesses, records, documents, notes and memoranda produced in the discovery. He wrote a memorandum opinion, ruling that the only basis for federal jurisdiction was under Section 605 of the Communications Act of 1934, 47 U.S.C. Sec. 151 et seq[2]; that plaintiff failed to sustain his burden on the motion for summary judgment; that Michigan Bell and its employees did not violate the Act; that the claim against Michigan Bell and its employees and the Detroit policemen arising out of acts alleged to have occurred prior to January 20. 1964, was barred by the three-year Michigan statute of limitations, M.S.A. Sec. 27A.5805(7); that the filing of the second amended complaint did not relate back to the date

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[2] The pertinent provision of the Act is:

> ". . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."

of the filing of the original complaint because new parties were added in unrelated claims; that the conclusory allegations of fraudulent concealment contained in the complaint were insufficient to toll the statute of limitations. The dismissal was without prejudice to plaintiff's claims under state law for breach of contract and violation of privacy.

The filing of the lawsuit was precipitated by what occurred on June 10th and 11th, 1965, during the performance of necessary work by Kaminski and Koss in the transfer of lines in a cable as required by a transfer sheet prepared by the assignment department of the telephone company. Kaminski was stationed at the company's Valley District office and Koss was up on a telephone pole at a cable box in the vicinity of plaintiff's residence. They experienced difficulty in their work due to an error on the transfer sheet. In order to obtain the unknown telephone number of the line involved, Koss made a connection at the cable box between the line and Kaminski's test desk so that the latter could ring out on the line. When he rang out, an unidentified woman answered. This woman was plaintiff's wife. She refused to give the telephone number to Kaminski and an argument ensued. Both Kaminski and Koss were on the line. Mrs. Bufalino overheard conversations between the two men. In making the connection and asking for the telephone number the employees were following usual testing procedures.

On the following day Kaminski obtained the telephone number from the assignment department and also instructions as to how to correct the transfer sheet. The line was then transferred by Koss. Kaminski called the number he had obtained from the transfer office to verify the fact that the line was working properly. Koss was on the line. The same woman answered the call and refused to confirm the

number or identify herself. She asked Kaminski to call her husband at another number. Kaminski called Bufalino, who recorded the conversation. Koss was also on the line and talked to Bufalino. They had an extended argument.

Following the telephone conversation, Bufalino telephoned an executive of the Michigan Bell and complained about his telephone line being tapped by Kaminski and Koss. He later called another representative of the company on the telephone and made the same complaint. In his conversations with the two representatives of the company he related in detail his conversations with Kaminski and Koss and Mrs. Bufalino's conversations with Kaminski. Mrs. Bufalino also called a representative of Michigan Bell and made a complaint.

Immediately Michigan Bell caused an investigation and interviewed both employees, Kaminski and Koss, who related what happened and the substance of their telephone conversations with Mr. and Mrs. Bufalino.

It is the contention of Bufalino that the employees of Michigan Bell violated Section 605 of the Act by intercepting and divulging the telephone communications.

In the first place, there was no interception by Kaminski. The calls were placed by him. He was the sender of the message and intercepted nothing. No liability attached merely because he made the calls. Koss was on the line with Kaminski's knowledge and consent, to assist in the performance of routine duties of their employment. Consent would necessarily be implied for without it neither employee could perform his duties.

In order to constitute a violation of Sectioon 605 there must be both an interception and a divulgence. There is no violation if interception was authorized by a party to the conversation. *Rathbun v. United States,* 355 U.S. 107

(1957); *Flnders v. United States*, 222 F.2d 163 (6th Cir. 1955). Here the alleged interception by Koss was authorized by Kaminski.

The Act was never intended to prevent a telephone company from installing, repairing or testing its lines. If appellant's contentions were upheld, the telephone company could not carry on its business.

Nor do we think that plaintiff can complain about any divulgence by the employees to their employer of the telephone conversations which they had with plaintiff and his wife, when he and his wife instigated the investigation that brought it about. Bufalino told the court, "I wanted an investigation." He got it. The company interviewed its two employees. Bufalino is chargeable with foreseeing that in the investigation the company would call upon its employees to explain and relate what had happened. Furthermore, Bufalino related his version of the same conversations to representatives of the company when he made his complaints. There was no proof that the employees related the conversations to any person other than an executive or representative of the company.

In our judgment there was no liability on the part of the company or any of its employees under Section 605 of the Act for the incidents which took place on June 10th and 11th, 1965.

In his second amended complaint, which added new parties, plaintiff alleged incidents which took place in 1962 and 1963, involving the installation of telephones at 15415 Mack Avenue, Detroit, Michigan, and the claimed wire tapping of plaintiff's telephone by the Detroit police. This complaint was not filed until January 20, 1967. Defendants

contend that the claim is barred by the Michigan three-year statute of limitations. M.S.A. 27A.5805(7).[3]

It is settled that state statutes of limitation apply in the absence of federal legislation on the subject. *International Union, Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Hire v. E. I. DuPont DeNemours & Co.*, 324 F.2d 546 (6th Cir. 1963); *Englander Motors Inc. v. Ford Motor Co.*, 293 F.2d 802 (6th Cir. 1961). The state statute of limitations which best effectuates federal policy should be applied. *Charney v. Thomas*, 372 F.2d 97 (6th Cir. 1967). We believe the three-year statute falls within this category.

Plaintiff contends that since the original complaint was filed on July 12, 1965, the amendment should relate back to that date, relying on Rule 15(c) Fed.R.Civ.P. In order to relate back, however, the claim must arise out of the conduct, transaction or occurrence set forth in the original complaint. The only specific acts charged in the original complaint related to the conduct of Kaminski and Koss in June, 1965. The named defendants were the company and two of its employees. The claim against Detroit police, which was alleged to have arisen in 1962 and 1963, obviously did not grow out of the 1965 occurrences but was separate, distinct and independent.

Nor can the defendants who were added by the amendment be deemed to have been parties to the original complaint under the fictitious designation of "Does". The action was never commenced as to the "Does" because they were not identified nor served with process. The statute of limitations is not tolled in the absence of service of process or otherwise acquiring of jurisdiction. M.S.A.

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[3] "(7) The period of limitation is three years for all other actions to recover damages for injuries to person or property."

27A.5856; *State Acc. Fund v. Catsman Co.,* 376 Mich. 194 (1965).

It is further contended by plaintiff that the allegation in the complaint that defendants fraudulently concealed their unlawful activities in order to escape detection, was sufficient to toll the statute of limitations.

Under Michigan law, in order to toll the statute there must be affirmative acts or misrepresentations. Mere silence is not sufficient. *International Union, Auto Workers v. Woods,* 337 Mich. 8 (1953); *Draws v. Levin,* 332 Mich. 447 (1952); *DeHaan v. Winter,* 258 Mich. 293 (1932).

The acts or misrepresentations must be pleaded. *Beaubien v. Beaubien,* 64 U.S. 190 (1859); *Janiszewski v. Behrmann,* 345 Mich. 8 (1956).

If, however, plaintiff's cause of action is based on fraud, a different rule would apply. The original fraud is regarded as a "continuing affirmative act, and mere silence of the defendant is treated as a concealment." *Dowse v. Gaynor,* 155 Mich. 38, 43 (1908); *Draws v. Levin, supra; cf. Hathaway v. Hudson,* 256 Mich. 694 (1932).

In *Draws,* the Court determined that there was no fraudulent concealment, but only after hearing the evidence. In our opinion, the issue as to whether the statute of limitations has been tolled by fraudulent concealment should be determined only after hearing the evidence as it relates to the defendants other than Michigan Bell and its employees who are dealt with in the consideration of their motion for summary judgment.

Under the ruling of the District Court requiring the complaint to relate the claims of plaintiff to specific incidents rather than to general conclusory allegations, and upon consideration of the affidavit of defendant, Paul Quaglia, which affidavit implicated himself and defendants,

George O'Connor, William Noseworthy and Sergeant William DePugh, in wire-tapping incidents taking place in 1962 and 1963, we are of the opinion that plaintiff's complaint states a claim upon which relief can be granted as to said defendants with respect to incidents related in the affidavit.

We next consider the motion of Michigan Bell and its employees as renewed, with respect to incidents other than those occurring on June 10th and June 11th, 1965.

It will be noted that Quaglia affidavit implicated only himself and three Detroit police officers. Quaglia's affidavit contained no charge that Michigan Bell or any of its employees had anything to do with the wiretapping incidents related therein. On the contrary, Bufalino offered oral testimony tending to prove that Michigan Bell had nothing to do with the wiretapping.

Albert C. Langtry, an employee of the telephone company, was called by plaintiff as a witness. Langtry was the employee who would have knowledge concerning any wire tapping activities of the company. He testified that he never had anything to do with tapping the Bufalino telephone line and had no knowledge of any such incident. He testified that the company's records indicate no claim was ever made by Bufalino that he suspected his line was being tapped, and he never made any investigation of wire tapping of Bufalino's lines. He further testified that to his knowledge no electronic or other equipment used to hear or record signals or oral conversations has ever been placed on Bufalino's line.

With all of the evidence before the Court, Bufalino could not rest on the bare conclusory allegations of his complaint. He was required to set forth *specific facts* showing that there is a genuine issue for trial. Rule 56(e) FED.R.Civ.P. This he failed to do. He admitted in his deposition that

he had no proof of intercepted communications other than the incidents involving Koss and Kaminski in 1965.

Summary judgment was authorized because, considering the evidence in the light most favorable to plaintiff, the District Court would be required to direct a verdict in favor of the Telephone Company and its employees. *Wilcox v. Transamerican Freight Lines, Inc.*, 371 F.2d 403 (6th Cir. 1967).

It should be pointed out further that the second amended complaint did not meet the pleading requirements set forth in the memorandum opinion of the District Court granting leave to file it. Except for the allegations with respect to Kaminski and Koss, and the installation at Mack Avenue in 1962 and 1963, the complaint did not relate the claims to specific incidents, but contained general charges of conspiracy, wire tapping, and violation of contractual and constitutional rights over a period of years. The Court had the power to require pleading of specific incidents of wire tapping and the dates in order that the defendants would be informed of the charges that they would have to meet. The Court was correct in ruling that the complaint did not state a claim upon which relief could be granted with respect to the general charges. Jurisdiction is not conferred on a federal court in a non-diversity case by mere conclusory allegations that one's constitutional or civil rights have been violated.

In our judgment the fifteen months' time allowed for discovery was adequate. The Court did not err in denying additional discovery.

We agree with the District Court's disposition of the non-federal claims.

The judgment of the District Court in favor of the appellees, Paul Quaglia, George O'Connor, William Noseworthy

and William DePugh, is reversed and the cause is remanded as to them for further proceedings consistent with this opinion. The judgment of the District Court in favor of the remaining appellees is affirmed. Each party shall pay his own costs.

JUDGMENT

Before: Weick, Chief Judge, O'Sullivan and McCree, Circuit Judges.

Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of the appellees, Paul Quaglia, George O'Connor, William Noseworthy and William DePugh, is reversed and the cause is remanded as to them for further proceedings consistent with the opinion. The judgment of the District Court in favor of the remaining appellees is affirmed.

Each party shall pay his own costs.

Entered by order of the Court.
Carl W. Reuss,
Clerk.

A True Copy.
Attest:
Carl W. Reuss, Clerk.

Issued as Mandate:

Costs: None

APPENDIX B

(U. S. District Court of Michigan—Eastern District, Southern Division)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS

William E. Bufalino,

Plaintiff,

v.

The Michigan Bell Telephone Company, Frank Kaminski, Robert Koss, Hollis Ballew, Robert Bullock, Albert C. Carr, Dino Constantini, William DePugh, Victor DeWolf (alias Victor Dukes), Marvin Gillespie, Howard Gladue, Albert C. Langtry, Earl Miller, Frank Montana, Albert Normali, William Noseworthy, George O'Connor, Jack D. Penland, Vincent Piersante, Arnold J. Pinn, Paul Quaglia, Billie Starks and Does, one to thirty-one inclusive.

Civil Action 27095

This is a civil action filed against the Michigan Bell Telephone Company, hereinafter referred to as Bell, six of its employees, one private detective, fourteen police officers of the City of Detroit, and thirty-one unidentified Does. The action arises out of an alleged conspiracy between the defendants to tap the telephone lines of plaintiff's private home phone in violation of 47 U.S.C. Sec. 605. The complaint also sets forth claims for breach of contract and for invasion of privacy. The relief sought herein is money damages and such other relief as is deemed appropriate by the court.

There are three groups of incidents alleged in the amended complaint under consideration herein which will be considered separately in this opinion. The first group of incidents involve all defendants other than Koss and Kaminski and are alleged to have occurred on specific dates prior to January 20, 1964. The second group of incidents also involve all defendants other than Koss and Kaminski and are alleged to have occurred on unspecified dates, sometime in 1963 or 1964 and continuing to the present. The third group of incidents relate to the alleged wiretapping by defendants Koss and Kaminski, employees of defendant Bell, which is claimed to have occurred in June, 1965.

As to the first group of incidents, defendants raise the defense of the statute of limitations, which for purpose of this motion we may deem to be the three-year period prescribed by Mich. Stat. Ann. Sec. 27A.5805 (7). Plaintiff's original complaint, filed on July 12, 1965, specifically named Koss, Kaminski and Bell as defendants and only referred to the third group of incidents occurring in June, 1965, although it did allege in general terms a conspiracy between the named defendants and fifty unnamed defendants referred to as "Does, one to fifty inclusive."

Plaintiff's first proposed amended complaint was not permitted to be filed because of the vague, conclusory nature of the allegations therein. However, plaintiff subsequently was permitted to file his second proposed amended complaint on January 20, 1967. In this amended complaint, plaintiff set forth the allegations referred to above in groups one and two, and repeated the allegations of group three.

The incidents of group one, which are alleged with some specificity, all occurred more than three years prior to the filing of the amended complaint. Defendants claim

they are barred by the statute of limitations. Plaintiff, on the contrary, contends that all defendants were actually made parties to this lawsuit when it was originally filed on July 12, 1965, even though they were only identified as "Does", and that the amendments to the original complaint relate back to the date the original complaint was filed pursuant to Fed. R. Civ. P. 15 (c). Plaintiff also contends that the allegation in his amended complaint that the defendants fraudulently concealed the existence of the cause of action and the identity of the defendants serves to toll the three-year limitation period pursuant to Mich. Stat. Ann. Sec. 27A.5855.

The court does not agree that plaintiff, in his original complaint, preserved his cause of action against defendants who were fictitiously named, were never served with process, and whose acts were not set forth with any particularity. Plaintiff has cited no authority in support of his contention, and the court hereby finds it to be without merit.

In addition, the court does not find that plaintiff has adequately pleaded a claim of fraudulent concealment so as to raise a fact issue of whether the statute of limitations was tolled. The authorities are clear that fraudulent concealment must be alleged with particularity in order to withstand an attack on the pleadings. *Beaubien v. Beaubien,* 64 U.S. 190 (1860). In applying Michigan law, the court in *Beaubien* said:

> The pleader has sought to avoid the operation of the limitation, by an averment of concealment and fraud on the part of the defendants and those under whom they claim . . . (The) averment is too general and indefinite to have the effect to avoid the operation of the statute. The particular acts of fraud or concealment should have been set forth by distinct

> averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made. 64 U.S. at 208.

More recent Michigan case law supports the proposition that a charge of fraudulent concealment so as to toll the statute of limitations will not be considered by the court when the allegations of the complaint do not support such a claim. *Janiszewski v. Behrmann,* 345 Mich. 8 (1956).

A careful reading of plaintiff's amended complaint discloses that nowhere is the claim of fraudulent concealment set forth with any greater specificity than mere conclusory allegation. An example of this pleading is as follows: "That all of these unlawful activities were fraudulently concealed by defendants in order to escape the detection of these unlawful activities and to conceal this cause of action from the plaintiff." This vague language is never made more specific, and it is apparent that it does not meet the pleading requirements set forth in *Beaubien, supra.* Nowhere in the complaint are the specific acts of fraud or concealment set forth, nor the time when such were discovered. For that reason, plaintiff has failed to allege matters which would even raise an issue of fact as to whether defendants' alleged acts of fraudulent concealment could be found to have tolled the statute of limitations.

Accordingly, the court finds that the three-year statute of limitations was not tolled by any acts of fraudulent concealment with regard to the matters raised in plaintiff's amended complaint and that it bars consideration of any cause of action which accrued prior to January 20, 1964, which is three years prior to the filing of the amended complaint. The court is not unmindful of the fact that plaintiff's original complaint was filed July 12, 1965 and

that the three-year limitations period would only bar causes of action alleged in that first complaint which accrued more than three years prior to that date. However, since the only cause of action set forth in the original complaint involved incidents which occurred in the year 1965, and since the court has determined that the allegations in the amended complaint do not relate back to the date of the filing of the original complaint, January 20, 1964 is the date which cuts off all claims accruing prior thereto. This ruling disposes of the first group of incidents referred to above.

In view of the foregoing, it is not necessary for the court to rule on the contention of some of the defendants that the statute of limitations applicable to this action is not the three-year period provided in Mich. Stat. Ann. Sec. 27A.5805 (7), but rather the one-year period provided in 47 U.S.C. Sec. 415(b), which is made applicable even to claims against employees of the common carrier by 47 U.S.C. Sec. 206. The only case interpreting Sec. 415 (b) which has been brought to the attention of the court is *Ward v. Northern Ohio Telephone Co.*, 251 F. Supp. 606 (D.C.Ohio 1966). In that case, the court held that Sec. 415 (b) barred claims by an operator and licensee of a radio station against the telephone company for damages for the company's alleged refusal or failure to give telephone and wire service when such claims arose more than one year prior to commencement of suit in the district court.

The second group of incidents referred to above, alleged to have occurred sometime in 1963, 1964 and on into the present, are not pleaded with sufficient particularity, even under federal notice pleading practice to apprise the defendants of the nature of the claims against them so that they can adequately prepare their defense thereto. The same reasoning was more fully set out in the court's memorandum opinion and order denying plaintiff's motion for

leave to file his first proposed amended complaint, entered November 23, 1966, and the court hereby incorporates the relevant portions of that opinion herein.

The third group of incidents, described above as those which allegedly occurred in June, 1965, present substantially different issues for the court to determine. They have not been challenged on the grounds of inadequate pleading nor statute of limitations bar. On the contrary, the motions filed with regard to these matters asks for summary judgment on the grounds that no genuine dispute exists as to any material fact and that defendants are entitled to judgment as a matter of law. In addition to receiving a series of affidavits and depositions from all parties concerned, the court also held a hearing at which testimony was offered and full legal arguments were presented. The record discloses the following facts.

On or about June 10, 1965, defendants Koss and Kaminski, both telephone company employees, were assigned to perform line repair work. Koss was a lineman who worked on the cables in the field and Kaminski was a test man at the Valley District office. These defendants were required to verify the cable work they had completed. In order to do this, Kaminski would attempt to call the subscriber whose phone had been worked on and then would switch Koss on the line for his verification. On June 10, 1965, after performing certain work on a designated line, Kaminski called the subscriber, which call was answered by plaintiff's wife, Mrs. Bufalino. At this time, unknown to Mrs. Bufalino, Koss was connected into the line and overheard the entire conversation. Kaminski and Mrs. Bufalino exchanged some rather sharp words as Mrs. Bufalino was unwilling to identify herself to the caller. Kaminski threatened to make trouble for Mrs. Bufalino if she refused to cooperate. Later that same day, Kamin-

ski called and spoke to Mrs. Bufalino who again refused to identify herself. Koss was again on the line and later in the conversation identified himself to Mrs. Bufalino. Sometime during that day, service on that line was interrupted. The following day, Kaminski called the same number with Koss on the line; this time, plaintiff picked up the phone and heard Koss and Kaminski talking to each other on the line before he began to speak. That entire conversation was recorded by plaintiff on a transcribing machine.

Following these events, plaintiff notified the telephone company that he suspected his wire was being tapped by defendants Koss, Kaminski and others and requested that the matter be investigated. Pursuant to this request, investigating employees of the telephone company contacted Koss and Kaminski and obtained from each of them a detailed report of the three conversations occurring on June 10-11, 1965.

There is no dispute that on the three occasions when Kaminski called the Bufalino home, Koss had been switched on the line at some intermediate point and had overheard the conversations. It is also undisputed that only on the first of these conversations did Koss remain silent and his presence unacknowledged by Mr. and Mrs. Bufalino. It is also undisputed that the only divulgence by Koss of any part of these conversations which plaintiff claims ability to prove was made in response to the investigation initiated by plaintiff and was directed only to telephone company supervising employees in response to the investigation requested by plaintiff. However, there is a dispute of fact as to whether Koss had obtained the prior knowledge and consent of Kaminski to overhear the above described conversations.

Plaintiff contends that the interjection of Koss into the connection between Kaminski and plaintiff phone by a mechanical device is an interception which is unlawful *per se* within the meaning of Sec. 605 and which cannot be made lawful by the consent of either or both parties to the communication. Plaintiff cites *Rathbun v. U.S.*, 355 U.S. 107 (1957), in support of this contention, claiming that consent was relevant in that case only because the interception was achieved by the use of "a regularly installed extension telephone." Plaintiff contends that Sec. 605 was intended to secure the inviolability of the entire communications system and not merely to protect the privacy of the communication itself. The court does not agree with this position. There is no logical basis for distinguishing between the consented use of an extension telephone and the consented intrusion by mechanical means into the communication system by a telephone company employee. It is difficult to imagine that Sec. 605 intended such arbitrary distinctions. To adopt plaintiff's position would make it impossible for telephone companies to obtain necessary verification from subscribers of cable work as it is being performed in the field. The court finds that the interception in this case was not unlawful *per se*. It would be unlawful if accomplished without the consent of one of the parties to the conversation, and as noted above, that issue is disputed.

Defendants make the further argument that there is not demonstrated in this case any unlawful divulgence which plaintiff is required to prove in order to make out a cause of action under Sec. 605. The only divulgence made of the allegedly unlawfully intercepted conversations by Koss was to his supervisor pursuant to an investigation initiated by plaintiff himself. Plaintiff replies that *any* divulgence of an unlawfully intercepted communication is a violation

of Sec. 605, regardless of who may have requested the divulgence. No authorities were cited to the court on this point. However, as this is a civil action, it is difficult to see why plaintiff should be allowed to assert as a basis for recovery a violation of his right when that alleged violation was instigated by himself. Accordingly, the court finds that Koss' disclosure of the conversations which he overheard to his supervisors pursuant to an investigation requested by plaintiff is not such divulgence as to render defendants liable for violation of Sec. 605, even were the interception found to be unlawful.

The amended complaint sets forth theories of liability in addition to the alleged violation of Sec. 605 discussed above. It also charges defendants with invasion of plaintiff's privacy and breach of the telephone company's contractual and statutory obligation to provide orderly telephone service. Defendants contend that this court has no jurisdiction to entertain an action based upon these other theories since diversity of citizenship admittedly does not exist in this case and since none of these theories presents a federal question.

Plaintiff contends that litigation involving the telephone company in contract matters necessarily involves a federal question, citing *Michigan Telephone Co. v. City of Charlotte*, 93 F. 11 (C. Ct. Mich. 1899). However, that case did not find federal question jurisdiction simply in the fact that the case involved a contract dispute with the telephone company. Rather, the court properly held that a federal question necessarily arose by the claim that an ordinance passed by defendant City of Charlotte impaired a contract previously entered into between the telephone company and the city. The claimed unconstitutionality of the ordinance rather than a breach of contract was the basis on which jurisdiction was asserted. In other words, the federal ques-

tion was not whether the City had breached its contract with the telephone company, but rather whether the ordinance passed by the city impaired the terms of the contract in violation of the Fourteenth Amendment. Accordingly, the court finds that no Constitutional question is presented in the instant case on the breach of contract issue.

Plaintiff's next contention is that federal question jurisdiction is invoked by charging defendants with an invasion of his privacy, which he claims is a violation of his Constitutional rights, citing *Griswold v. Connecticut,* 381 U.S. 479 (1965). Although *Griswold* did recognize that at least in certain respects the right of privacy was Constitutionally protected, it did not hold that every invasion of privacy by governmental action was a violation of the Constitution. No case has been brought to the court's attention that determines any factual situation such as alleged herein to raise a Constitutional question insofar as the right of privacy is concerned. Therefore the court finds that plaintiff has failed to state a claim of violation of his constitutional rights upon which relief could be granted.

While not expressing any opinion on the merits of plaintiff's causes of action based upon breach of contract and invasion of privacy, this court finds that they do not raise federal questions and must be referred to state tribunals for their resolution. Although not urged by plaintiff, it is reasonably clear that the above-described causes of action could be properly brought before this court if they were pendent to a litigable federal question. However, in view of this court's findings with reference to the cause of action based upon 47 U.S.C. Sec. 605, it is clear that no pendent jurisdiction attaches as to the other matters.

Accordingly, this court finds that plaintiff has failed to sustain his burden on a motion for summary judgment to demonstrate to the court that he is entitled to a trial on the alleged Sec. 605 violation and further finds that plaintiff's theories of action based upon breach of contract and invasion of privacy do not present federal questions.

Not considered in this opinion is the contention of the telephone company that it and its employees would not be liable for damages in the circumstances as alleged in this matter, under the authority of *Craska v. New York Telephone Co.*, 239 F. Supp. 932 (D.C. N.Y. 1965).

Finally, it should be noted that plaintiff has had more than ample opportunity to file adequate pleadings in this matter. As noted above, his original complaint was filed July 12, 1965. In response, defendants Bell, Koss and Kaminski filed motion for summary judgment upon which extensive briefs were filed and considerable oral argument was entertained. When that motion was taken under advisement, plaintiff filed a motion for leave to file his first proposed amended complaint on November 14, 1966. Again extensive briefs and argument were entertained by the court, and the matter was finally disposed of in a detailed memorandum opinion and order denying motion for leave to file amended complaint, dated November 23, 1966. However, plaintiff was given leave to file a second proposed amended complaint, which he filed on December 9, 1966. Defendants filed a motion to deny leave to file this second amended complaint and to dismiss same. After more argument and briefs were presented, the court on January 18, 1967, ordered this second proposed amended complaint to be docketed. It was then filed January 20, 1967.

The purpose of this lengthy and somewhat repetitious recital of facts is to demonstrate that plaintiff has had

more than ample opportunity to correct any defects in his pleadings which have been the subject of such detailed consideration by the litigants themselves and by the court. However, there must be an end to all litigation and the court does not find it in the interest of justice to permit the plaintiff once again to file proposed amended pleadings in order to see whether he is able at this time to state a claim upon which relief can be granted.

For the foregoing reasons, It Is Ordered that defendants' motions to dismiss and for summary judgment be, and they hereby are, Granted, and that plaintiff's non-federal causes of action be, and they hereby are, dismissed without prejudice and that plaintiff's other causes of action be, and they hereby are, dismissed with prejudice.

Thaddeus M. Machrowicz,
U. S. District Judge.

Dated at Detroit, Michigan this 27th day of April, 1967.

A true copy:

Frederick W. Johnson, Clerk,
By Walter Bielski, Deputy Clerk.

APPENDIX C

United States District Court
Eastern District of Michigan, Southern Division

William E. Bufalino, Plaintiff, vs. The Michigan Bell Telephone Company, Frank Kaminski, Robert Koss and Does, One to Fifty, inclusive, Defendants.	Civil Action No. 27095

ORDER DOCKETING PLAINTIFF'S SECOND PROPOSED AMENDED COMPLAINT

At a session of said Court, held in the Federal Building, in the City of Detroit, Michigan, on the 17th day of January, 1967.

Present: Honorable Thaddeus M. Machrowicz, U. S. District Judge.

A second proposed amended complaint having been filed herein pursuant to the court's memorandum opinion and order of November 23, 1966 denying leave to file plaintiff's first proposed amended complaint, and defendants having filed a motion in opposition to the formal docketing of plaintiff's second proposed amended complaint, and the matter having come on for hearing, and briefs having been filed by all parties, and it appearing that at least some of the issues raised by defendants in their motion should more properly be raised by the individuals who are to be added as additional parties defendant by the second proposed

amended complaint, and that a final determination of these issues should await their presentation and argument by all parties whose interests will be affected thereby and upon due consideration,

It Is Hereby Ordered, that plaintiff's second proposed amended complaint be formally docketed and that no further action or discovery be taken in this matter until each of the defendants is served and given an opportunity to file responsive pleadings.

Thaddeus M. Machrowicz,
U. S. District Judge.

A true copy:

Frederick W. Johnson, Clerk,
By Walter Bielski, Deputy Clerk.

APPENDIX D

Bohn Aluminum & Brass Corporation,
Plaintiff-Appellant,
v.
Storm King Corporation,
Defendant-Appellee.
No. 14717
United States Court of Appeals — Sixth Circuit

May 23, 1962

Victor W. Klein, Butzel, Eaman, Long, Gust & Kennedy, Detroit, Mich. (Peirce Wood, Coolidge, Wall & Wood, Dayton, Ohio, on the brief), for appellant.

John Froug, Dayton, Ohio (Froug & Froug, Dayton, Ohio, on the brief), for appellee.

Before Miller, Chief Judge Weick, Circuit Judge, and Starr, Senior District Judge.

Weick, Circuit Judge.

[1] The District Court granted Storm King's motion for summary judgment and dismissed the complaint on the ground that Bohn was a foreign corporation not authorized to do business in Ohio and was transacting intrastate business without obtaining a license from the state and therefore could not maintain the action. Ohio Revised Code Sections 1703.-01-1703.31; Manhattan Terazzo Brass Strip Co., Inc. v. A. Bensing & Sons, 72 Ohio App. 116, 50 N.E. 2d 570 (1943); Woods v. Interstate Realty Co., 337 U.S. 535, 69 S.Ct. 1235, 93 L. Ed. 1524 (1949); Lyon v. Quality Courts United, Inc., 249 F. 2d 790 (CA 6, 1957). In dismissing the complaint, the District Court relied on the stipulation of certain facts and affidavits.

The stipulation covered only two points: (1) that the plaintiff, prior to this action, had qualified as a foreign corporation but that it had permitted this license to lapse,[1] and (2) that the contract upon which the action was based was written by the plaintiff and prepared in Detroit, Michigan and sent to the defendant at Miamisburg, Ohio. Because of disagreement, the parties subsequently met in Ohio and renegotiated the terms of the contract to the mutual satisfaction of the parties. The changed contract was prepared in Ohio.

The affidavit of Joseph A. Zissen, president of Storm King, stated that Storm King transacted business with Bohn in Ohio and entered into the contract in suit in Ohio; that Bohn has maintained an office in the Third National Bank Building in Dayton for the past twelve years; that its factory representative Charles F. Freiburger called upon Storm King on numerous occasions since 1956 to acquaint it with Bohn's products and encourage it to use them; that Freiburger surveyed the needs of Storm King and by reason of said activity the contract in suit was entered into at Dayton, Ohio; that Bohn pays the rent and clerical expenses of its offices in Ohio including the salaries of its factory representatives; that Bohn's name appears on both the general and yellow page listing of the telephone directories and on the doors of its offices and in the building directories of the buildings in various cities in Chio where it has offices; that the factory representatives in Ohio hold themselves out as having authority to represent Bohn in transacting its business in Ohio.

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[1]. An affidavit of William J. Lane, secretary of the plaintiff company, filed on the same day as the District Court's order, stated that plaintiff had maintained branch offices and warehouses in Ohio, but discontinued those operations seven years prior to the commencement of this lawsuit.

The affidavit of Charles F. Freiburger stated that he is the plaintiff's sales representative and that he and another sales representative of the company share office space with an insurance company in the Third National Bank Building in Dayton paying therefor $90.00 a month; that the telephone is listed under the name of Bohn; that his and his associate's primary function is to solicit orders for Bohn products which are referred to its Detroit office for acceptance and as an incident thereto they call at the place of business of a customer who made a complaint to investigate its men and report to Bohn; that Bohn has other sales representatives located in Cleveland and Brecksville whose duties are substantially the same as those in the Dayton office except the one in Brecksville operates from his home.

The question whether Bohn is transacting business in Ohio is usually determined by consideration of all angles and circumstances of the case and using thereto the applicable law. The District Court, after reviewing the above-mentioned papers, granted a summary judgment under Rule 56(c),[2] and Rules of Civil Procedure, 28, U.S.C. and determining as a matter of law that Bohn was transacting business in Ohio and had not complied with Ohio law and was entitled to maintain the present action.

Storm King contends that the maintenance by Bohn of sales offices located in the state of Ohio with resident salesmen who not only stimulated sales but took some part in the adjustment of the complaints, the employment by Bohn of clerical help in Ohio, the listing of Bohn's name in building, telephone and classified directories indicated activities wholly local in nature, and in addition to those which may properly be regarded as interstate in character.

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[2]. Rule 56(c) provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

It is the position of Bohn, on the other hand, that there was a genuine issue over whether it was transacting business in Ohio. It claims that its sales representatives merely solicited orders which were forwarded to out of state offices of Bohn for acceptance and that its activities were therefore interstate in character.

Bohn challenged in this Court most of the affidavit of Zissen on the ground it contained conclusions of ultimate fact and law as well as matters of which Zissen did not have personal knowledge.

[2, 3] In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. 6 Moore's Federal Practice Par. 56.15(3), pp. 2123-2126.

It has been stated that: "The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute * * *." 6 Moore's Federal Practice Par 56.11 (1), p. 2057. See also: Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962).

The use of summary judgment has been denied in instances where there was a dispute as to the voluntariness of the plaintiff's resignation, Paroczay v. Hodges, 111 U.S. App. D.C. 362, 297 F. 2d 439 (CA D.C., 1961); for the alleged violation of antitrust laws wherein it was contended that the defendant purchased a radio station and cancelled the affiliation of the plaintiff's company, Poller v. Columbia Broadcasting System, Inc., supra; see also Dovberg v. Dow Chemical Co., 195 F. Supp. 337 (D.C.E.D. Pa. 1961) where

the question related to the fair market price of the sale of gas, Sartor v. Arkansas National Gas Corp., 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944), and where the question was whether certain employees were employees or were, because of their stockholder-director status, not employees. Hoy v. Progress Pattern Co., 217 F. 2d 701 (CA 6, 1954).

[4] Rule 52(a), Federal Rules of Civil Procedure provides that it is unnecessary to have findings of fact and conclusions of law on motions under Rule 56. The reason therefor is because in a motion for summary judgment, there is no question as to the facts and that a movant would be entitled as a matter of law to the granting of the motion. Lindsey v. Leavy, 149 F. 2d 899 (CA 9, 1945); Prudential Insurance Company v. Goldstein, 43 F. Supp. 767 (D.C. E.D.N.Y., 1942).

In the present case, except for a short stipulation which did not cover all of the facts, we have only affidavits submitted by the parties from which conflicting inferences can be drawn.

We think that the issue of transacting business in Ohio should be determined on the trial of the case where the court will have the opportunity to consider the testimony of witnesses, instead of affidavits, and adopt findings of fact and conclusions of law. Discovery procedures will be available to obtain all necessary facts with respect to the nature and extent of Bohn's activities in Ohio.

As stated in Steiner v. Wertheimer, 250 F. 2d 574, 575 (CA 6, 1957): "The factual situation should be fully developed through the usual trial procedure in the District Court, instead of summary judgment proceedings."

We express no opinion on the merits of this controversy.

The judgment of the District Court is vacated and the cause remanded for further proceedings in conformity with this opinion.